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NSW ANIMAL WELFARE REFORM

ISSUES PAPER:
AN ANIMAL LIBERATION SUBMISSION



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DOCUMENT DETAILS

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ABOUT ANIMAL LIBERATION

Animal Liberation has worked to permanently improve the lives of all animals for over four decades.

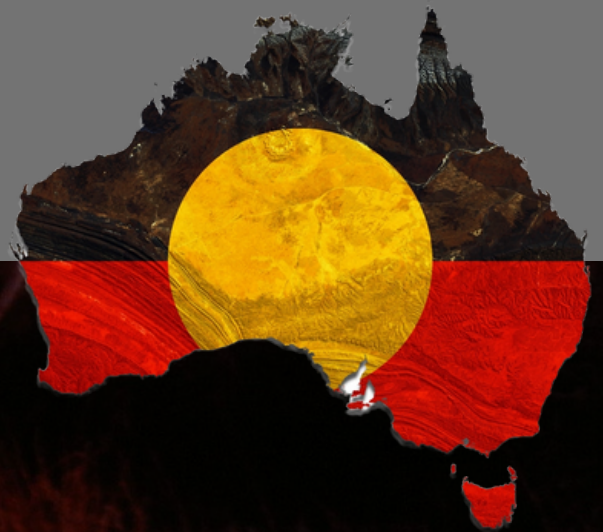
We are proud to be Australia's longest serving animal rights organisation. During this time, we have accumulated considerable experience and knowledge relating to issues of animal welfare and animal protection in this country.

We have witnessed the growing popular sentiment towards the welfare of animals, combined with a diminishing level of public confidence in current attempts, legislative or otherwise, to protect animals from egregious, undue, or unnecessary harm.

Our mission is to permanently improve the lives of all animals through education, action, and outreach.

**WE ACKNOWLEDGE THE
TRADITIONAL & TRUE
OWNERS OF COUNTRY
THROUGHOUT AUSTRALIA
AND RECOGNISE THEIR
CONTINUING CONNECTION
TO LAND, WATERS AND
CULTURE.**

**WE PAY OUR RESPECTS TO
THEIR ELDERS PAST,
PRESENT AND EMERGING.**



ANIMAL LIBERATION



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EXECUTIVE SUMMARY

- 1** The Department of Primary Industries (hereafter, 'the Department' or 'the DPI') has sought public commentary on reforms concerning animal welfare law in the State of NSW. Animal Liberation welcomes the opportunity to provide commentary and does so in the following document.
- 2** Due to the scale of suffering that is inflicted on farmed animals, land and marine alike, these species have taken precedence in this document. As such, the following submission primarily relates to the third phase of the Plan, though it is informed by the entire document provided by the Department. This focus will provide ample evidence showing that the current regulatory regime is patently and inherently flawed. It is neither in line with the best available science or practice nor meets growing community expectations regarding animal welfare issues.
- 3** It is understood that the second phase of the reform process (*implementation*) applies only to companion animals. Though the third phase (*compliance and enforcement*) concerns legislation applicable to farmed animals, we strongly recommend that the aforementioned narrow focus of phase two to be expanded to include animals commonly farmed for their flesh, fibres or bodily fluids (i.e., their flesh, skin and milk, respectively).
- 4** We request that it be noted from the outset that the following document is not intended to provide an exhaustive commentary or assessment of the issues under consideration. Rather, it is intended to provide *a general examination of select areas of key concern*. As such, the absence of discussion, consideration or analysis of any particular aspect or component of the Act, the reform process itself or any auxiliary document(s) must not be read as or considered to be indicative of approval, consent or acceptance.

EXECUTIVE SUMMARY (CONT.)

5 Broadly, however, the following submission holds:

- 5a:** that the current regulatory regime and framework governing animal welfare issues in NSW is patently and inherently flawed;
- 5b:** that any reforms that do not sufficiently and transparently address these significant flaws will fail to achieve the objectives and goals of the NSW Animal Welfare Action Plan;
- 5c:** that significant and non-negotiable changes must be made in the effectiveness of compliance and enforcement efforts;
- 5d:** that the Australian public is increasingly demanding higher levels of welfare in line with increasingly recognition of animal sentience, individuality and ability to experience a gamut of emotion;
- 5e:** that regulation of animal welfare issues must be effective, consistent and proactive;
- 5f:** that an operational and available solution is the establishment of an Independent Office of Animal Welfare.

6 Finally, and in general, the following submission holds the following to be true:

- 6a:** that other-than-human animals can and do routinely suffer as a direct result and consequence of a range of human behaviours, actions and choices;
- 6b:** for legislation of any kind to function properly and achieve its stated objectives, it must not only be well designed but appropriately executed and efficiently and effectively enforced (see Gunningham 2011);
- 6c:** that the ability and proven capacity of other animals to suffer obliges us to minimise or eliminate the occurrence of such physical or mental harm and provide appropriate protection(s);
- 6d:** that to live ethically, healthfully, and sustainably, choices which needlessly or unnecessarily cause harm to other animals, threaten the environment, and/or public health must be avoided or minimised (as far is possible).



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PROLOGUE

"Laws are like sausages. It is better not to see them being made" - Philip Ruddock (2007)

The most recent national Australian survey shows that there are almost 29 million animals in two-thirds of every household across the country (AVA 2020). Of these, over 85% consider their companion animal a "family member" rather than a "pet" (Chen 2016). A higher proportion of people live with an animal than they do with a child and there are more pets than people in Australia (Roy Morgan 2015; Power 2013). As a nation, we collectively spend approximately \$1 billion on companion animal expenses per annum (AMA 2019). Yet, many people continue to consider the notion of granting animals any kind of "rights" fanciful or irrational (Sunstein 2003).

There are a range of reasons why this is so. Core amongst them is the manner by which our culture has acclimatised us to consider other animals (Joy 2010). The majority of our relationships or interactions with other animals are transactional; we get out more than we give. Precious few species are afforded a limited range of *protection*; none are currently bestowed *rights*. The primary way in which we govern these often conflicting protection regimes is via the concept of *welfare*.

This document will address each of the questions provided by the NSW DPI concerning reforms to the *Prevention of Cruelty to Animals Act 1979* (hereafter, 'the Act' or 'POCTA'). These questions, plus the objectives of the Act, are included in the Appendix of this document. It will conclude with a series of modest recommendations informed by the following information. This document seeks to establish a framework for providing other animals with a range of non-negotiable *rights* based upon an enforceable and proactive legislative protection framework.

The core concern of the present submission can be encapsulated in three succinct words: **welfare is experiential**.

It is ultimately concerned with the following question...

"...can one regard a fellow creature as
**a property item, an investment,
a piece of meat, an 'it',**
without degenerating into
cruelty towards that
creature?"

- Karen Davis (2005)



UNTIL THE COWS COME HOME

"What happens to them, matters to them"

- Tom Regan (2004)

Some have said that the crafting of laws "must remain ever servant, never master" to a developing society (Clark 1942). That is, they must be versatile enough to allow for cultural progression. Such adaptability can be achieved via procedural reform, though in some cases it is encoded in legislation itself. The Western Australian equivalent of POCTA, for instance, cites one of its intentions as reflecting "the *community's expectation* that people who are in charge of animals will ensure that they are properly treated and cared for" (emphasis added). Similarly, Queensland's Act contains clauses concerning the creation of standards that align with "*changes in community expectations* about practices involving animals" (emphasis added). Thus, some legislation already (partially) provides for reform insofar as they include clauses for emerging community expectations regarding the treatment of other animals and their welfare. In sum, as society develops, so too must the manner in which it is governed.

Others have emphasised that, in practice, laws such as those under consideration function in tandem with prevailing politics and the culture in which it exists. This conception of "culture" holds that it is the historical transmission of commonly understood and communicated meaning (Geertz 1973). The tandem nature of the law/culture nexus is especially true insofar as the political underpinnings of a culture effectively create the *values* that the community expects. These *values* thereby become *objectives* of subsequent laws (Cerar 2009). If this is so, the objectives of the Act ought to reflect the values of the society it governs. The ways in which these are encoded is also a byproduct of the culture in which it is crafted (Sierocka 2014). The law can thus be considered a culture's "official vision of social order", with prohibitions on those acts or behaviours it considers unacceptable (Post 2003).



In other cultures, our most popular and common companion animals - cats and dogs - are eaten in the same manner Australians currently consume cows, pigs and chickens (see Fig. 1). South Korea, for example, has a long cultural history of cat and dog meat consumption (Podberscek 2009; Herzog 2010; Czajkowski 2014). The typical Western reaction of disgust or revulsion at this prospect reveals how "culture conditions our dietary behaviour" and how who we "choose to eat" forms identity and arranges beliefs about belonging (Fiddes 1994; Williams 2000; Fessler and Navarrete 2003; Joy 2010). This also reveals the ways in which categorising animals along a continuum or spectrum of utility provides for differential distributions of protection (Herzog 2010). In the Western world, at one pole are companion animals. At the other are those reviled as "pests," routinely killed using methods most unthinkable for any other species (Thiriet 2007; Traïni 2011; Power 2012; Taylor and Signal 2015; Polák 2019). The use of the poison sodium fluoroacetate, commonly referred to as "1080", to kill unwanted or unwelcome wildlife is one such example (Sherley 2007; Marks 2013).

That is, the same individuals who lovingly dote upon cats and dogs, share their beds and often outwardly or publicly mourn their deaths, are often the same people who appear to have no qualms strong enough to stop engaging in, implicitly supporting or financially backing the killing of other animals for food, fashion or entertainment. A significant moral quandary is that some of those animals are killed to feed the animals they so care for (Knight and Leitsberger 2016; Clipsham 2017). A substantial portion of wild caught forage fish, for example, are used for purposes other than human consumption, including companion animal food production (De Silva and Turchini 2008).

Fig. 1. Different cultures value different animals



CASE STUDY: EQUAL RIGHTS FOR WOMEN

INTERSECTIONS OF OPPRESSION

The underlying premise of the discrimination and chauvinism that underpins the inequality the women's rights movement has rallied and continues to rally against is the perceived biological differences between the sexes (Fineman 1994). Such differentiation was as pervasive as the language adopted in everyday life and legislation alike (Spender 1980). In 1867, John Stuart Mill proposed to amend an Act by replacing the word 'man' by 'person' (van Wingerden 1999). The proposal was defeated (Cejudo 2010). The movement sought to politicise unquestioned social norms that collectively favoured one sex over the other (Rogan and Budgeon 2018). In many ways, a range of social forces intersected to negatively impact the lived experiences of women (Smith 1983). Feminists have critiqued the manner by which society is governed, particularly insofar as power and control it is unevenly distributed (Bryson 1992). In general, it can be described as "a movement to end sexist oppression" (hooks 2000).

Indeed, feminists were obliged to ask the most basic of biological questions: "what is a human being?" The reason being that jurisprudence, the theory or philosophy of law, was and is "about human beings" (West 1988). We are individual human beings, but we belong to the same species (*Homo sapiens*). At its core, this distinction between ourselves and others means that we collectively accept that "there are individuals with separate lives" (Nozick 1974). This also implies a degree of reciprocity and interpersonal responsibility.

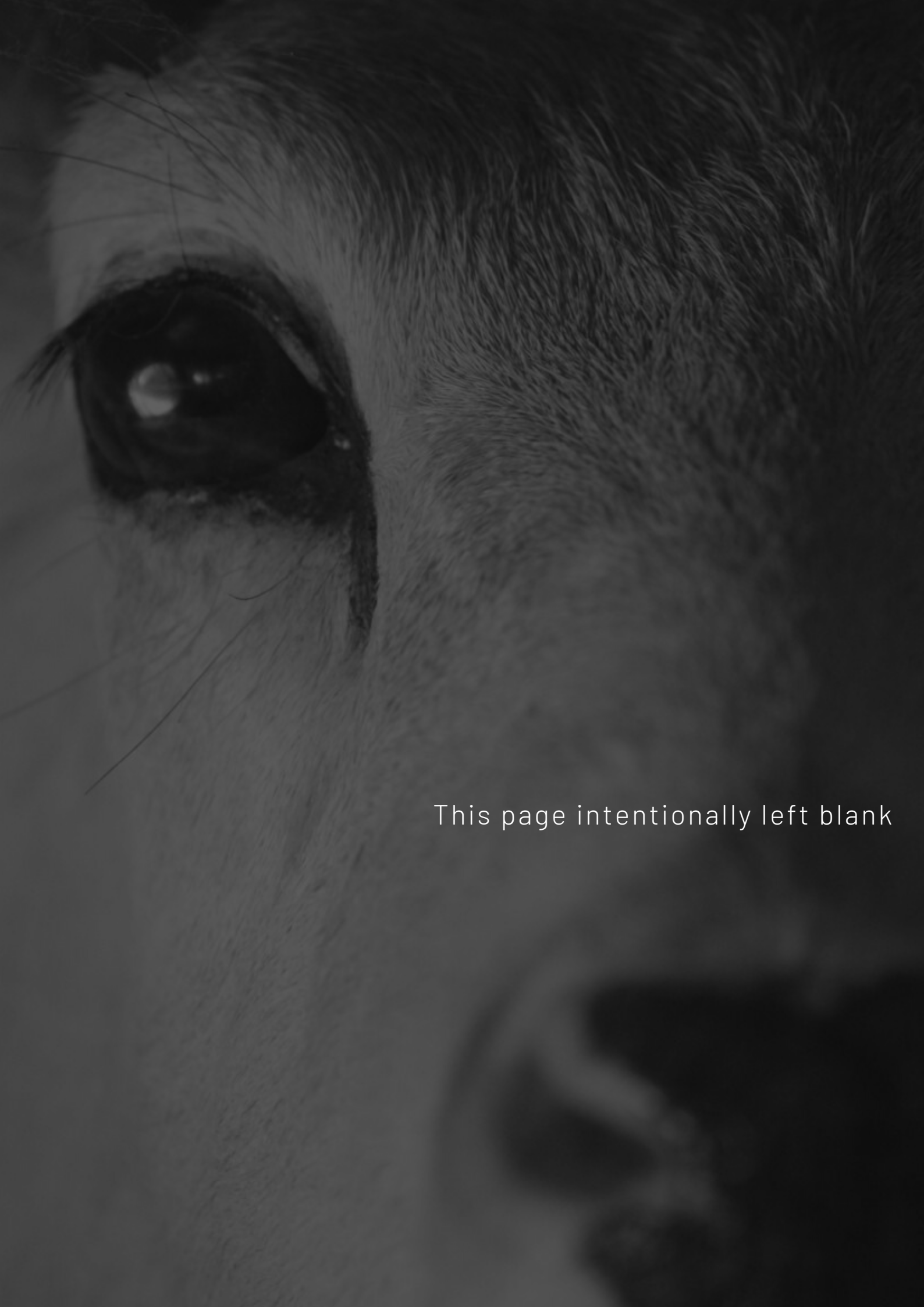
At the time, contemporary law was critiqued by feminist scholars and lawmakers as upholding a "male standard". Such a standard would remain in force and influence all subsequent decisions, and thus, would inevitably lead to further or prolonged inequalities, unless genuine reform was achieved *from the ground up* (Lipschultz 1989). Thus, feminism and feminist legal theorists have held "a healthy skepticism toward legal doctrine" (Rothenberg 1996). Animal advocates are likely to do the same for similar reasons. Yet, even while the women's rights movement was without the obstacle of being obliged to "speak on behalf of" their oppressed minority, progress was still perceived as moving "at a snail's pace," while discrimination continues and equality has still not been achieved to this day (Becker 1999; Plickert and Sterling 2017).

It is the premise of this document that a similar "species standard" presently exists in animal welfare legislation.

Legislation concerning cruelty to animals has been considered "an excellent example of an area of public law operating to advance the private rights of capital" (Gregory 1994). This is because the existence of an underlying premise that defines other-than-human animals are items of property degrades the purpose of the legislation to the point of incoherency. That is, the objective of POCTA is to *prevent cruelty* to animals. Such prevention, however, is conditional. The current regime of laws provide offenders with ample wriggle room. This is in addition to the creation and implementation of other auxiliary documents, such as Standard Operating Procedures and Codes of Practice which provide offenders with exceptions or exemptions (Thiriet 2007).

Perhaps most importantly, it patently fails to achieve its objectives. These objectives are further degraded by the creation and adoption of supplementary documents, such as Standard Operating Procedures (hereafter, 'SOPs') and Codes of Practice (hereafter, 'COPs'). Other clauses or provisions within the Act make the execution of its powers to enforce or protect animals a rather toothless tiger. This is amplified by the reliance on charities to oversee, govern and enforce the Act. Each of these concerns will be addressed in the following document.





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WHAT IS WELFARE ?

TOWARDS AN EXPERIENTIAL DEFINITION

WELFARE is generally defined as the health, happiness and fortuity of an individual or a group of individuals. It can be applied to a range of subjects, including human and other-than-human¹ animals (Tomer 2015; Phillips 2009). It may refer to a procedure, conscious or concerted effort to promote positive outcomes, which can in turn be considered by others along a continuum ranging from *good* to *bad* (Carenzi and Verga 2009). Such a dichotomy (i.e., *good* vs. *bad*) also tends to characterise the framing of human stakeholders² in issues involving animal welfare (Taylor 2004; Mazur 2006).

Welfare can be defined as the overall or general health, happiness and condition of an individual or a group of individuals. It may, however, also refer to a regulatory policy ostensibly crafted to promote and provide for the fundamental physical, physiological or psychic wellbeing of an animal or a group of animals.

It is simultaneously THEORETICAL and PRACTICAL.

The present document will ask that these differences be set aside in order to provide a functional Act that acknowledges welfare as an EXPERIENTIAL state that human activity or behaviour can positively or negatively impact upon. It concludes with a series of recommendations that we believe will enable this essential shift in policy and practice.

1. "Other-than-human" is used to emphasise that humans are, in fact, animals. This challenges the definition contained within POCTA, bestowing the term "animal" on all vertebrates except humanity. As Jane Goodall explains in the foreword to the Encyclopaedia of Animal Rights and Animal Welfare, "because human beings are animals, this book could have been expanded to include the horrible abuse and torture to which we subject other humans". See Goodall in Bekoff and Meaney 1998.

2. "Stakeholder" is defined in this document as "any individual or groups of people, organised or unorganised, who share an interest (financial, moral, legal, personal, community-based, direct or indirect) in a particular issue". One study identified over 400 stakeholders as identifying with the issue of animal welfare. See Mazur 2006.

Public opinion gleaned from the latest official figures on animal welfare issues are unequivocal (Futureye 2018).

A full 95% of Australians consider animal welfare to be an area of concern, with at least 91% of these wanting to see this improved through reforms. The results of a comprehensive study commissioned by the Commonwealth are anything but ambiguous: "the perceived gap between expectations and regulation spells increasing risk for the Australian federal government, and more specifically the Department of Agriculture and Water Resources which currently has very limited powers over farm animal welfare" (Futureye 2018). This latter concern stems from the fact that **RESPONSIBILITY** for animal welfare issues, including the application of corresponding regulations and Codes of Practice, lies with the relevant State and Territory authorities (Englefield et al. 2019).

The purpose of this document is to establish and emphasise that other animals encounter the gamut of experiences and emotions that humans do. They are, therefore, deserving of respect and an array of **RIGHTS** (McCausland 2014).

In fact, such a concept is far from new. In the late 1700s, one philosopher wondered aloud: "the day may come, when the rest of the animal creation may acquire this rights which never could have been withholder from them but by the hand of tyranny" (Bentham in Kazez 2010).

Despite significant advances in our understanding and comprehension of other beings' existences, the issue of animal **CONSCIOUSNESS** remains contentious. This is a particularly important element when crafting any legislation or legal instruments intended to protect animals or prevent harm or cruelty from being inflicted upon them. Though individuals express a diversity of opinions and beliefs about other animals, these views can be "organised according to a spectrum of values" (Mazur 2006).

Unsurprisingly, it is the opinion of Animal Liberation that animals ought to be afforded a range of non-negotiable **RIGHTS**. Thus, we stand at one end of the spectrum. However, we concede that these rights needn't be identical to those humans enjoy simply by being born with fingers instead of feathers, fur, or fins.

The same author who asked who could be responsible for conferring an inferior status on all other animals beckoned for the day when they would be afforded their due RIGHTS. That day would come when humanity recognised that “the number of legs, the villosity of the skin, or the termination of the os sacrum, are reasons equally insufficient for abandoning a sensitive being to the same fate”. He asked, as if genuinely confused, “what else is it that should trace the insuperable line?” Asking “is it the faculty of reason, or, perhaps, the faculty of discourse?” No, it couldn’t be these. Presaging the premise of the contemporary “Bible” of the modern animal rights movement, *Animal Liberation* by Australian philosopher Peter Singer, the author maintained “a full-grown horse or dog is beyond comparison a more rational, as well as a more convertible animal, than an infant of a day, or a week, or even a month, old” (Singer 1975; Villanueva 2016).

Failing to find any rational or reasonable justification for the ways in which humans treat other animals, he finally wrote, “the question is not, Can they reason? nor, Can they talk? but, Can they suffer?” (Bentham 1781). Others 18th century contemporaries concurred, claiming that “political communities owe something to animals” and that they did so “on the basis that they are SENTIENT” (Cochrane 2010).

Right now, NSW is playing ethical catch-up.

States such as Germany have delivered votes to guarantee animal rights in their constitution, adding the words “and the animals” to a clause that obliges the state to respect and protect their dignity in 2002 (Sunstein 2003).

Across our internal border, the ACT became the first Australian government to legislate the recognition of other animals as sentient beings.

The move to include sentience in the ACT’s equivalent of POCTA suggests that animals have “inherent value”; it was a move strongly supported by a range of organisations and stakeholders (RSPCA Australia 2019; Kumar et al. 2019).

WHAT IS SENTIENCE?

THE BEDROCK OF RIGHTS & WELFARE

Reforms such as those that triggered the creation of this document present an opportunity to bestow a measure of these rights upon other animals. SENTIENCE is a core component of the concept of welfare itself. That is, should an animal be shown to be sentient (i.e., to have the ability to perceive their environment and experience a range of sensations), “consistency and impartiality require that [they] be acknowledged as morally relevant” (Kemmerer 2006). A range of ethical arguments can be used against this core claim. However, given the broad acceptance of sentience in other animals, we recommend that the definition of the word “animal” in the Act be edited to *include* rather than *exclude* Homo sapiens.

We believe that doing so is consistent with the available science and public opinion. Doing so will also enable comparisons to be made between harm regardless of the specific species it is inflicted upon. Failing to find any rational or reasonable justification for the ways in which humans treat other animals, Jeremy Bentham finally wrote, “the question is not, *Can they reason?* nor, *Can they talk?* but, *Can they suffer?*” (Bentham 1781). The answer is an unequivocal yes. Others 18th century contemporaries concurred, claiming that “political communities owe something to animals” and that they did so “on the basis that they are SENTIENT” (Cochrane 2010).



WHAT IS SENTIENCE?

THE BEDROCK OF RIGHTS & WELFARE

Though PHILOSOPHY has long “dealt with the question of the ‘brutes’” and has considered the minds of humans and other animals to be “radically different from one another,” the growing academic field of critical animal studies (‘CAS’) has increasingly argued that other animals are moral subjects who deserve a degree of respect (Kazez 2010; Carruthers 2013; Sorenson 2014; Taylor and Twine 2014). Interdisciplinary studies are continuing to show that “many animals experience such emotions as joy, fear, love, despair and grief” (Bekoff 2000). Others have shown that evidence exists to suggest that other animals “can infer concepts, formulate plans and employ simple logic in solving problems” (Gould and Gould 1998). Grief following the loss of a partner, family or community member, for instance, has been witnessed in a range of species (King 2013). Some have even been known to engage in behaviour that strongly resembles rituals or rites (Brooks Pribac 2013).

Like the ideological pioneers who dared to first asked if animals can suffer, the Commonwealth study identified SENTIENCE as a major driver behind contemporary consumers demands for products of greater animal welfare. This, however, is not new either. It has been known for some time (Southwell et al. 2006). Though perception of sentience differs between people and species, the majority of Australians consider the animals we eat most as sentient. Over 50% of Australians believe that some species, such as cattle, sheep, goats and pigs, are fully sentient, with a further >40% believing them to be “somewhat sentient” (Futureye 2018).



CASE STUDY: PROTECTION FOR POULTRY?

NO BEAK? NO BITE

Following the 2017 announcement that the standards and guidelines for all species of poultry would be reviewed for the first time in over a decade, the public overwhelmed Animal Health Australia ('AHA') by submitting over 167,000 documents. AHA subsequently issued a press release explaining that it had received "a record number of submissions" over "five times the amount of submissions received during the development of welfare standards and guidelines for other industries" (AHA 2018). The accompanying independent report published five months later explained that "it was clear" that "the welfare of poultry" is of genuine public interest, with the majority of submissions expressing concern with the ways in which birds are currently treated across the country (Bray 2018).

Though the Standards included a range of mandatory requirements, they also included a gamut of non-binding Guidelines. That is, the Standards are framed in non-negotiable language. The Guidelines are additional and, thus, *optional*. The majority of the Standards appear to draw upon Broom's 1986 original "Five Freedoms" concept (e.g., protection from disease and provision of adequate food and water).

The process also included a number of "supporting papers" for specific species or procedures. One of these papers concerned "access to water for ducks" and asked whether it was necessary "to provide open water sources for commercial ducks". Despite acknowledging that ducks have "a strong instinctive behaviour" associated with water, exhibited by studies showing that they have "a preference for open water without prior experience" indicative of "an innate need," the paper concluded that the technology required to allow this in industrial settings was prohibitive. It outright denied the capacity for the industry to utilise any kind of pondage system. The public expressed shock at the fact that animals synonymous with water are intensively farmed without any access to it (Graham 2018).

Under the broad objective mandating that a person "in charge of an animal" must competently do so in order to "minimise the risk to the welfare of poultry," the Guidelines included elements as fundamental as "understanding the standards and guidelines" and "obtaining knowledge of relevant animal welfare laws". That is, the Standards are *optional* under the Guidelines.



WHAT IS SENTIENCE ?

THE BEDROCK OF RIGHTS & WELFARE

Such figures are revealing. Far more portentous, however, are the primary findings of the federal report. Those who believed animals are sentient (i.e., >90% of the population) “had a high alignment with [animal rights] activist statements relating to animal rights and freedoms” (Futureye 2018). This is in stark contrast to the framing activism or advocacy on behalf of other animals receives in the media and from certain political parties, some of whom have compared animal rights activists or advocates as “akin to terrorists” (Almiron et al. 2018; Potter 2014). Concerning the media, it is a primary social institution whose function is to provide citizens with access to information. It has significant influence and capacity to guide how humans engage with or access information. Regarding political parties, it is clear that each have interests which they prioritise above others. Despite this, “fundamental beliefs about animal ethics” are often shared by both the Coalition and the ALP (Chen 2016).

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